

2005

Arnold K. West and Mary Helen West, Plaintiffs/  
Appellees, vs. Claudia N. Case, individually, and as  
Trustee of the Lamar West Trust dated May 6,  
1993, and as Trustee of the Georgia Lamar West  
Trust dated January 21, 1999, Defendant/  
Appellant : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ARNOLD K. WEST and MARY  
HELEN WEST,

Plaintiffs/Appellees,

vs.

CLAUDIA N. CASE, individually, and  
as Trustee of the Lamar West Trust  
dated May 6, 1993, and as Trustee of  
the Georgia Lamar West Trust dated  
January 21, 1999,

Defendant/Appellant,

BRIEF OF APPELLEES

Appeal No. 2005-0315 CA

Appeal from the Fourth District Court, Utah County  
Provo Department, Judge Taylor

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### **STATEMENT OF JURISDICTION**

Jurisdiction is proper under Utah Code Ann. § 78-2a-3(2)(j), as this appeal was transferred to this Court by the Utah Supreme Court. (R. 744.)

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

Appellees West respond to Appellant Case's statement of issues as follows (the issues are restated verbatim from the Brief of Appellant):

**Issue No. 1** - *Whether the trial court erred in finding that, as a matter of law, Plaintiffs/Appellees were entitled to an order quieting title in and to the Subject Property in them, free and clear of any claim of Defendant/Appellant.*

**Response:** This issue was not preserved below. Although subject matter jurisdiction may be raised at any time, this question does not pertain to subject matter jurisdiction but to the sufficiency of the pleadings, which issue was not raised or preserved below. Therefore, there is no proper ground for review of this issue.

**Issue No. 2** - *Whether the trial court erred in finding that, as a matter of law, Defendant/Appellant was in breach of the 1987 Uniform Real Estate Contract through her refusal to convey, on behalf of the May 6, 1993 trust for the January 21, 1999 trust any interest in and to the Subject Property, notwithstanding Appellee's failure to pay taxes on the Subject Property during the contract period*



*as required by the terms of the 1987 Uniform Real Estate Contract, thus entitling Plaintiff/Appellees to specific performance of the contract and an award of costs and attorneys fees.*

Response: Appellees are satisfied with Appellant's Statement of Issue No. 2; therefore, no response is required.

**Issue No. 3** - *Whether the trial court erred in finding that, as a matter of law, Georgia Lamar West had waived Appellee's obligation to [pay] taxes on the Subject Property during the period of the 1987 Uniform Real Estate Contract.*

Response: Appellants incorrectly state that the standard of review for this issue is one of correctness. The correct standard of review is that a reviewing court grants "very broad discretion to the trial court's application of legal propositions to the facts in waiver cases." Living Scriptures, Inc. v. Kudlik, 890 P.2d 7, 10 (Utah App. 1995)(quoting Trolley Square Assocs. v. Nielson, 886 P.2d 61, 65 (Utah App. 1994)).

Case also raises the secondary issue of whether the trial court erred by granting equitable relief to the Wests under the doctrine of unclean hands. See Brief of Appellant, p. 22. This issue is not reviewed for correctness but "is reviewable only for abuse of discretion." Hone v. Hone, 2004 UT App 241, ¶ 9; see also McKeever v. Fiore, 829 A.2d 846, 852 (Conn.App.Ct. 2003) ("The

application of the doctrine of unclean hands rests within the sound discretion of the trial court.").

**Issue No. 4** - *Whether the trial court erred in finding, as a matter of law, that Defendant/Appellant was the successor-in-interest to the Georgia Lamar West and/or the Estate of Georgia Lamar West, and therefore obligated under the 1987 Uniform Real Estate Contract .*

Response: Appellees are satisfied with Appellant's Statement of Issue No. 4; therefore, no response is required.

**Issue No. 5** - *Whether the lower court erred in denying Appellant oral argument on summary judgment.*

Response: This issue should be: Whether the lower court abused its discretion in denying Appellant oral argument on summary judgment. This issue is reviewed under an abuse of discretion standard. Fennell v. Green, 2003 UT App 291, ¶ 9 ("a trial court may exercise its discretion to require compliance with the Rules of Judicial Administration, particularly rule 4-501")

### **DETERMINATIVE RULES**

#### **Code of Judicial Administration Rule 4-501(3)(C):**

In cases where the granting of a motion would dispose of the action or any claim in the action on the merits with prejudice, either party at the time of filing the principle memorandum in support of or in opposition

to a motion may file a written request for a hearing... such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

## **STATEMENT OF THE CASE**

### **Nature of the Case**

Claudia Case (hereafter “Case”) appeals summary judgment entered in favor of Arnold and Mary West (hereafter “the Wests”).

### **Course of Proceedings**

On December 28, 1999, the Wests filed a Complaint in the Fourth District Court for Utah County, Provo Department. (R. 15.) West sought to quiet title to the Subject Property and brought claims for breach of contract and slander of title. (R. 15.) On July 25, 2000, the Wests moved for partial summary judgment. (R.65.) On September 6, 2000, the court denied that motion in a written ruling. (R.237.) On September 15, 2000, the Wests moved the court to clarify that ruling, raising several issues. (R. 241.)

### **Disposition in the Trial Court**

On October 2, 2000, the trial court, in a memorandum decision, granted the Wests’ motion for partial summary judgment. (R. 247.) The trial court awarded

the Wests their costs and attorneys fees in the amounts of \$6,302.50 (R. 287) and \$1,537.50 (R. 347) for a total award below of \$7,840.00.

**Statement of Facts Relevant to the Issues Presented for Review**

1. In early 1987, the Wests entered into a Uniform Real Estate Contract with Georgia Lamar West for the purchase of certain real property in American Fork, Utah (referred to herein as “the Subject Property”). (R. 182.)

2. Contemporaneous with the execution of the Uniform Real Estate Contract, Lamar West executed a Warranty Deed in favor of the Wests on April 8, 1987. (R. 181.)

3. Pursuant to paragraph 2 of the Uniform Real Estate Contract, Lamar West agreed to sell the Wests the following described real property:

Parcel 2; Beginning 378.50 feet West along the monument line and 333.45 feet South from the American Fork City monument at the centerline intersection of 300 West street and 300 North street; thence North 84° 30' West 30.00 feet; thence South 16° 59' 15" West 176.14 feet to the North Right-of-Way line of Union Pacific Railroad Co., thence South 63° 23' East 89.29 feet along said Right-of-Way line; thence North 0° 25' East 205.68 feet to the point of beginning. Containing 0.25 acres.

Parcel 3; Beginning 378.50 feet west along the monument line and South 333.45 feet from the American Fork City monument at the intersection of 300 North st.; thence South 0 25'00" West 205.58 feet to the north Right-of-Way line of the Union Pacific Railroad Co.; thence South 63° 23'00" East 55.40 feet along said Right-of-Way line;

0° 25' East 225.61 feet along a fence line; thence North 84° 30'00" West 49.91 feet to the point of beginning. Containing 0.246 acres.

(R. 181.)

4. The legal description of property contained in the Warranty Deed executed by Lamar West on April 8, 1987 is identical to that of the legal description contained in paragraph 2 of the Uniform Real Estate Contract. (R. 181.)

5. Shortly after entering into the Uniform Real Estate Contract with Lamar West, the Wests moved into the house located on the Subject Property and have lived there ever since. (R. 180.)

6. Paragraph 19 of the Uniform Real Estate Contract states in relevant part:

19. The Seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned and except as may have accrued by or through the acts or neglect of the Buyer[.]

(R. 180.)

7. After the Uniform Real Estate Contract and Warranty Deed were executed by the parties, the Warranty Deed was placed in escrow, first with First Security Bank and then with Weststar Escrow, Inc., with the understanding that the

Wests would make monthly payments to the escrow company on their contractual obligation, and that once they had completed making the payments, the Warranty Deed would be released to them for recording. (R. 180.)

8. The real property that was the subject of this transaction was a portion of a larger parcel of property owned by Lamar West that she divided for purposes of this transaction. (R. 180.)

9. On May 6, 1993, at a time the Warranty Deed was still being held in escrow, Lamar West formed the Lamar West Trust dated May 6, 1993 with herself as Trustee, and executed and recorded a Quit-Claim Deed, conveying to herself as Trustee of the Lamar West Trust the larger parcel of property that included the real property that was subject of the Uniform Real Estate Contract entered into with the Wests, excepting from this conveyance the piece of property designated as "Parcel 2" in the Uniform Real Estate Contract and Warranty Deed, with the piece designated as "Parcel 3" now included in the trust. (R. 179-180.)

10. In March, 1998, The Wests fulfilled their obligation to Lamar West on the Uniform Real Estate Contract by making their final payment to the escrow company, and received a release of the Warranty Deed from the escrow company. (R. 179.)

11. Plaintiff's recorded the Warranty Deed, but were told by the Utah County Recorder that the grantor was improperly vested because a portion of the property conveyed by the Warranty Deed was held by the Lamar West Trust and the grantor on the Deed was Lamar West individually, not Lamar West as Trustee of the Lamar West Trust. (R. 179.)

12. Plaintiff's sought to have Lamar West execute a corrected Warranty Deed but she refused. (R. 179.)

13. On November 20, 1997, Lamar West amended Section 7.6 of the Lamar West Trust to provide that Case and Bettie Joe Nerdin West would be successor co-trustees of the trust. (R. 178.)

14. On January 21, 1999, Lamar West created the Georgia Lamar West Trust, which document amended in its entirety the Lamar West Trust dated May 6, 1993 and any other trust she may have had. (R. 178.)

15. This trust designated Lamar West and Case as co-trustees, and designated Case as successor trustee upon the death of Lamar West. (R. 178.)

16. The trust was established to administer Lamar West's estate after her death and contains provisions to accomplish that purpose. (R. 178.)

17. In March, 1999, Lamar West died and Case became Trustee of the Georgia Lamar West Trust dated January 21, 1999. (R. 178.)

18. The Wests then sought to have Case execute a proper Warranty Deed pursuant to the terms of the uniform Real Estate Contract but she refused. (R. 178.)

19. Paragraph 22 of the Uniform Real Estate Contract states:

22. It is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors, and assigns of the respective parties hereto.

(R. 177.)

20. Case, as Trustee of the Georgia Lamar West Trust, is the successor in interest to Lamar West's interest in property she held as Trustee of that trust. (R. 177.)

21. On June 9, 1999, Case as Trustee of the Lamar West Trust dated May 6, 1993, executed and recorded a Quit-Claim Deed to herself as Trustee of the Georgia Lamar West Trust dated January 21, 1999, which deed contained a legal description of real property that included and encompassed the property that was the subject of the Uniform Real Estate Contract and Warranty Deed executed by Lamar West in favor in The Wests in early 1987. (R. 177.)

22. Co-Trustee Betty Joe Nerdin West did not participate in the conveyance represented by the June 9, 1999 Quit-Claim Deed. (R. 177.)



23. Case claims that the Georgia Lamar West Trust dated January 21, 1999 presently owns the real property that was the subject of the Uniform Real Estate Contract entered into between Lamar West and The Wests. (R. 176-177.)

24. The Wests have never received a clear title to the real property they purchased pursuant to the Uniform Real Estate Contract they entered into with Lamar West and the Warranty Deed they received from her. (R. 176.)

25. Paragraph 21 of the Uniform Real Estate Contract states.

21. The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise.

(R. 176.)

26. Lamar West paid all of the property taxes on the real property that was the subject of the Uniform Real Estate Contract and Warranty Deed executed by herself and the Wests in early 1987 for the time period that the Warranty Deed was held in escrow. (R. 233.)

27. Paragraph 16 of the Uniform Real Estate Contract at issue states:

In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment of payments

when the same shall become due, or within thirty days hereafter, the Seller at his option shall have the following alternative remedies.

A. Seller shall have the right, upon failure of the Buyer to remedy the default within five days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may at his option re-enter and take possession of said premises without legal processes as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land become [sic] the property of the Seller, the Buyer becoming at once a tenant at will of the Seller; or

B. The Seller may bring suit and recover judgment for all delinquent installments, including costs and attorney's fees. (The use of this remedy on one or more occasions shall not prevent the Seller, at his option, from resorting to one of the other remedies hereunder in the event of a subsequent default): or

C. The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the Buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Utah, and have the property sold and the proceeds applied to the payment of the balance owing, including costs and attorney's fees, and the Seller may have a judgment for any deficiency which may remain. In the case of foreclosure, the Seller hereunder, upon the filing of a complaint, shall be immediately entitled to the appointment of a receiver to take possession of said mortgaged property and collect the rents, issues and profits therefrom and apply the same to the payment of the obligation hereunder, or hold the same pursuant to order of the court; and the Seller, upon entry of judgment of foreclosure, shall be entitled to the possession of the said premises during the period of redemption.

(R. 232-233.)

28. Neither Lamar West nor Case have ever exercised any rights provided by paragraph 16 of the Uniform Real Estate Contract as a result of an alleged default by The Wests, and have specifically never provided any notices required by paragraph 16 of the contract to the Wests. (R. 231-232.)

29. On several occasions over the course of several years, Lamar West told the Wests and Betty Jo West that she would pay the property taxes on the property for the time that the Warranty Deed was in escrow and that The Wests should not worry about paying the property taxes. (R. 231.)

### **SUMMARY OF ARGUMENTS**

The trial court clearly has subject matter jurisdiction over quiet title actions. The actions of the trial court were proper in that there were no genuine issues of material fact and summary judgment in favor of the Wests was proper. The trial court erred in its refusal to hear oral argument, but such error was not an abuse of discretion and therefore not reversible error.

### **ARGUMENT**

#### **I. THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION OVER THE WESTS' QUIET TITLE CLAIM.**

- A. Case's attempt to raise subject matter jurisdiction is actually a challenge aimed at the sufficiency of the pleadings, which was not raised in the trial court and therefore not preserved for appeal.

Case artfully attempts to argue that a party's alleged failure to state a claim somehow divested the trial court of subject matter jurisdiction over that claim. She offers no legal support for this proposition other than citation to the quiet title statute. It is clear, however, that the trial court does indeed have general subject matter jurisdiction over a quiet title claim and that this is an improper attempt to argue a motion to dismiss for the first time before this Court. See Chen v. Stewart, 2004 UT 82, ¶ 36 (“One of the consequences of the non-waivable nature of subject matter jurisdiction is that attempts are sometimes made to mischaracterize other jurisdictional elements as defects in subject matter jurisdiction in order to revive an otherwise belated objection.”)(citations omitted).

Failure to state such a claim is simply a procedural deficiency that may be cured, whereas lack of subject matter jurisdiction cannot be cured. In any event, the sufficiency of the pleadings and whether the Wests properly stated a quiet title claim was not raised below and should not be considered in this appeal. See Demet v. Zeman, 486 P.2d 487, 87 Nev. 294, 299 (1971)(“we decline to decide in the first instance on appeal . . . the sufficiency of pleadings that have never been passed upon by the lower court); Burem v. Harville, 174 S.W. 2d 663, 26 Tenn. App. 595, 603 (1943)(“the complainant is not in a position to question the sufficiency of the

pleadings in this [appellate] Court. No demurrer to or motion to strike any part of the defendant's answer was filed in the lower Court.”)

Case also failed to preserve this issue in the trial court. “In order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.” Brookside Mobile Home Park v. Peebles, 2002 UT 47, ¶ 14(citing Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998)). The following three factors help determine whether the trial court had such an opportunity: (1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority. Id.

Here, Case failed to specifically raise the sufficiency of the pleadings and whether they stated a quiet title claim. Other than a general boilerplate defense stated in the Answer, Case was silent on this issue below. Since this issue was not even raised in a motion to dismiss or motion to strike, Case did not argue or introduce any legal authority with respect to the quiet title claim. Because the issue was not preserved below, this Court must pass on the invitation to consider the sufficiency of the complaint for the first time on appeal.

B. The Wests properly stated a quiet title claim before the trial court.

Even if Case had preserved the issue of the sufficiency of the pleadings, it is clear that the complaint stated a quiet title claim. While the legal authority cited by Case is applicable, Case reaches an incorrect conclusion.

Case contends that the Wests failed to allege they held title to the Subject Property and only sought to receive title under the real estate contract. While it is correct that the Wests did seek specific performance of the contract between the parties, the complaint also supports the allegation that the Wests held title to the Subject Property and that such title should have been quieted in the Wests.

The complaint states as follows:

10. In early 1998, Plaintiffs paid the purchase price for the property in full, fulfilling their obligation under the contract, and received the referenced Warranty Deed from the escrow agent, which Warranty Deed was then recorded with the Utah County Recorder's Office on April 14, 1998. . . . .
31. By executing the aforementioned Quit-Claim Deed and by refusing to deliver a proper Warranty Deed to Plaintiffs, Defendant has clouded the title to the real property in question.
32. Plaintiffs are entitled to an order quieting title in them to the subject real property as it is described in the Uniform Real Estate Contract and Warranty Deed they were provided by Lamar West.

(R. 9 & 13). These allegations clearly establish a quiet title claim in that the Wests claimed title to the Subject Property under the Warranty Deed that was duly

executed by Lamar West and later properly delivered to them by the escrow agent pursuant to fulfillment of the escrow conditions. The Wests also alleged the subsequent quit-claim deed was a cloud on their title. These allegations were sufficient to state a quiet title claim.

## II. THE TRIAL COURT'S ORDER FOR SPECIFIC PERFORMANCE OF THE 1987 REAL ESTATE CONTRACT WAS PROPER.

Case contends that genuine issues of fact precluded the trial court's summary judgment in favor of the Wests. The facts they alleged before the trial court, however, do not establish any genuine issue of material fact as to waiver, or the remedy of specific performance.

- A. The trial court's equitable order was proper as Case failed to adequately support the "unclean hands" defense, which nevertheless was vitiated by Lamar West's waiver of the provision she alleges was breached.

The doctrine of "unclean hands" is recognized in Utah but it has never been held to be an absolute bar to recovery. Parduhn v. Bennett, 2005 UT 22, ¶ 42 (citations omitted). A district judge's application of the unclean hands doctrine is reviewable only for abuse of discretion. Id. (citing Hone v. Hone, 2004 UT App 241 at ¶ 9 ("For this reason, we cannot say that the trial court abused its discretion in concluding that the appellant does not come with clean hands.")); see also

McKeever v. Fiore, 829 A.2d 846, 852 (Conn. App. Ct. 2003) ("The application of the doctrine of unclean hands rests within the sound discretion of the trial court.").

In determining whether a party acted with unclean hands, the court will look to the intent of the party, not the effect of its actions, and will only find unclean hands present if there has been fraud or bad faith. Schivarelli v. Chicago Transit Authority, 355 Ill. App. 3d 93, 103 (2005)(citation omitted). Here, Case failed to present any evidence at trial to show any intent of fraud or bad faith on the part of the Wests. The only basis for the unclean hands defense set forth by Case is the allegation that the Wests failed to pay property taxes as required under the contract. The trial court found, however, that that requirement was waived. Even if such were not the case, Case has failed to show any bad faith or other actions that would elevate the Wests' action from a mere alleged breach to inequitable action. Case's defense of unclean hands is therefore unavailing as the Wests "did equity" at all relevant times.

- B. The trial court properly found that Lamar West had waived the property tax provision in the Contract.

Case contends that the trial court was incorrect in finding that Lamar West had waived the Wests obligation under the Contract to pay property taxes on the Subject Property. Case, however, failed to show any genuine issue of material fact



as to waiver in the court below. Here on appeal, Case has failed to marshal the evidence regarding waiver.

1. Case failed to establish a genuine issue of material fact as to Lamar West's waiver of the payment of property taxes provision.

Case failed to establish a genuine issue of fact as to waiver before the trial court. The Wests, by affidavit or otherwise, established several facts with respect to waiver that were uncontroverted by Case. The trial court initially denied the Wests' motion for partial summary judgment because it believed there were factual issues as to whether the Wests met the escrow conditions. After reconsideration, the court realized that the only condition that was not met was the payment of property taxes. The court then ruled that Lamar West had waived the property taxes requirement. (R. 244-245).

Once a moving party (the Wests) has presented sufficient evidence to support the claim for judgment as a matter of law, the burden shifts to the non-moving party to provide evidence creating an issue of material fact. According to the Utah Code of Judicial Administration (in effect at the relevant times herein), "[a]ll material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing

party's statement." Utah Code Jud. Admin. 4-501(2)(B)(in effect during the relevant time period). Therefore, "when the moving party has presented evidence sufficient to support a judgment in its favor, and the opposing party fails to submit contrary evidence, a trial court is justified in concluding that no genuine issue of fact is present or would be at trial." Smith v. Four Corners Mental Health Ctr., 2003 UT 23, ¶ 40.

In the court below, Case only made general denials in response to the Wests' contentions of undisputed fact. See R. 196-199. Those general denials, without specifically controverting the facts pertaining to waiver, were insufficient to establish a factual issue below and the trial court was justified in concluding that no genuine issue of fact was present. On appeal, Case argues that Lamar West's refusal to sign a corrective deed was evidence that she did not intend to waive the Wests' payment of property taxes. There were no facts introduced below to support this contention. Moreover, Lamar West's refusal was some time *after* waiver had been accomplished, i.e., after Lamar West had paid the taxes, told the Wests they would not have to pay the taxes, and refrained from exercising her default rights under the Contract.

2. The trial court's finding of waiver should be upheld because Case has failed to properly marshal the evidence.

Even if Case had specifically controverted the Wests' facts, she has failed to marshal the evidence before this Court. In order to challenge a court's factual findings, "an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." Chen v. Stewart, 2004 UT 82, ¶ 76 (citation omitted). Where a trial court's rulings on highly fact-dependent issues are challenged, Utah appellate courts grant broader than normal discretion to the trial court. Id. (citing State v. Pena, 869 P.2d 932, 936-38 (Utah 1994); Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n, 857 P.2d 935, 939-42 (Utah 1993) (recognizing waiver to be a factually sensitive issue requiring the trial court's exercise of discretion in applying the law to facts)).

Accordingly, where the legal standard is extremely fact-sensitive, as it is here, the appellant has the duty to marshal the evidence. Id. Because Case has failed to properly marshal the evidence, this Court should "accept the trial court's findings on that basis alone." Id. (citing Wilson Supply, Inc. v. Fraden Mfg. Corp., 2002 UT 94, ¶ 26).

C. The statute of frauds is an affirmative defense that was not pleaded below and was therefore waived.

For the first time on appeal, Case asserts a statute of frauds defense to the trial court's finding that the real estate contract was modified so that Case was not

obligated to pay property taxes on the Subject Property. The statute of frauds is an affirmative defense which must be pleaded or it is waived. See Utah R. Civ. P. 8(c); Phillips v. JCM Dev. Corp., 666 P.2d 876, 884 (Utah 1983). Case did not plead the statute of frauds defense before the trial court. That defense was therefore waived and should not be considered by this Court on appeal. See Promax Development Corp. v. Mattson, 943 P.2d 247, 253 (Utah App. 1997).

D. The modification at issue is excepted from the statute of frauds.

Even if Case had raised the statute of frauds defense below, it would not have precluded enforcement of the modified agreement. Generally, if an original agreement was required to comply with the statute of frauds, any material modification of that agreement must also conform to the statute of frauds. Holt v. Katsanevas, 854 P.2d 575, 580 (Utah App. 1993)(citing Allen v. Kingdon, 723 P.2d 394, 396-97 (Utah 1986)). In Allen, however, the Utah Supreme Court recognized an exception to this general rule, "where a party has changed position by performing an oral modification so that it would be inequitable to permit the other party to found a claim or defense on the original agreement as unmodified." Id.

In addition, transactions for the sale of realty may be exempted from the statute of frauds where there is "sufficient performance on the part of [one party]

exclusively referable to the alleged contract to exempt it from the effect of the statute of frauds." Id. (citing Ryan v. Earl, 618 P.2d 54, 55 (Utah 1980)). When an oral contract otherwise prohibited by the statute of frauds becomes enforceable because of part performance or otherwise, "the Statute does not prevent enforcement of the remaining promises." Id. (citing Restatement (Second) of Contracts § 147(2) (1979)).

Here, the modification, while otherwise prohibited by the statute of frauds, became enforceable because of Lamar West's express waiver of the property tax clause of the Contract and Lamar West's actual payment of the property taxes. The modification is therefore excepted from the statute of frauds and was properly enforced.

### III. CASE WAS PROPERLY FOUND IN BREACH OF THE 1987 REAL ESTATE AGREEMENT.

Case contends that she was not a successor to the Contract and is therefore not bound by it. The trial court found that a successor is merely one who succeeds or takes the place of another. See R. 247 (quoting Park National Bank v. Travelers Indemnity Co., 90 F. Supp. 275, 277 (W.D. Mo. 1950)). The court also relied on Oquirrh Associates v. First National Leasing Co., 888 P.2d 659, 663 (Utah Ct. App. 1994), stating that successors of the parties can only refer to those who succeed to one party's interest in the contract through inheritance, assignment, or

the like; and that Case had taken Lamar West's place with regard to the Contract and had succeeded to her interest through "assignment, or the like." See R. 246.

Case is bound by the Contract as Lamar West's successor by virtue of being the Trustee of her testamentary trusts. Simply because Lamar West conveyed a portion of the contract property to herself as Trustee of her first trust by quit-claim deed, does not change her or her estate's obligation to the Wests on the Contract.

Indeed, if Case's argument were true and she was not liable on the Contract, an individual could: 1) enter into a contract to sell real property, 2) have a warranty deed to the property held in escrow, 3) create a trust and convey the property to herself as trustee of the trust by quit-claim deed; and thereby be free of any obligation on the contract to convey the property. This result is unjust and should not be condoned by the courts.

According to Bogert, Trusts and Trustees § 719, pp. 323-324 (2d ed. 1982):

If the settlor, prior to the creation of the trust, made a contract with reference to the trust property, the trustee who later accepts the trust is not liable upon the contract unless he expressly assumed liability. The acceptance of the trust does not constitute an implied assumption of the liabilities of the settlor with regard to the trust res.

But if the contract or conveyance of the settlor with regard to the trust property not only created in personam obligations against the settlor, but also fastened an in rem obligation on property which later became the trust res, the trustee by accepting the trust takes it subject to such in rem liabilities and has a duty in his representative capacity

to satisfy those liabilities out of trust property, and will be liable personally for failure to perform his fiduciary duties in this respect.

**Thus if a settlor has made an enforceable contract to sell land and later transfers the realty to a trustee, the latter may be held as trustee for specific performance of the settlor's contract by reason of his ownership of the land and the fact that he is not a bona fide purchaser of it, but he is not liable for damages at law for failing to perform the contract.**

(emphasis added).

The case of Hopkinson v. First Nat. Bank of Provincetown, 293 Mass. 570, 200 N.E. 381 (Mass. 1936) also provides direction. There, Hopkinson entered into a contract with Linnell to purchase land, paid the purchase price, and received a written promise from Linnell to provide him with a deed to the property at a later time. Linnell died without delivering a deed to Hopkinson, although a deed had been requested several times. The defendant bank was trustee of Linnell's estate, and as such, held title to the land that was subject of the Linnell-Hopkinson contract. Hopkinson sued seeking specific performance of the contract.

The Supreme Judicial Court of Massachusetts held in favor of Hopkinson, stating that "the bank as executor and devisee was a volunteer, and took subject to the equitable duty of Linnell specifically to perform his contract with the plaintiff." Id. at 573 (citing Lykins v. McGrath, 184 U.S. 169 (1902)).

In the instant case as in Hopkinson, Case, as Trustee of Lamar West's testamentary trusts, is bound by the contract Lamar West entered into with the

Wests for the sale of the Subject Property, as Lamar West's successor to the contract. These authorities show the key distinction is that Case is a successor by virtue of her position as trustee of Lamar West's testamentary trust. The Court's action in ordering specific performance was therefore proper and should be affirmed.

IV. THE TRIAL COURT'S REFUSAL TO HEAR ORAL ARGUMENT IS HARMLESS ERROR AND THEREFORE NOT AN ABUSE OF DISCRETION.

Case contends that the trial court's refusal to hear oral argument constitutes reversible error. That refusal, however, even if done in violation of the applicable rule, is only harmless error. Harmless error is defined as an error that is sufficiently inconsequential that there is no reasonable likelihood that the error affected the outcome of the proceedings. Covey v. Covey, 2003 UT App 380, ¶21 (citing Crookston v. Fire Ins. Exch., 817 P.2d 789, 796 (Utah 1991)). Put in other words, an error is harmful only if the likelihood of a different outcome is sufficiently high as to undermine confidence in the result. See Id. On appeal, the appellant has the burden of demonstrating an error was prejudicial - that there is a reasonable likelihood that the error affected the outcome of the proceedings. Id. (citing Steffensen v. Smith's Mgmt. Corp., 820 P.2d 482, 489 (Utah Ct.App. 1991, aff'd, 862 P.2d 1342 (Utah 1993))).



Here, Case has failed to meet her burden– to demonstrate that the trial court’s denial of oral argument was harmless or prejudicial, or that there is a reasonable likelihood the denial affected the outcome of the proceedings. Moreover, while the language of Rule 4-501 seems to mandate certain provisions (using the word “shall”), numerous cases have established that “a trial court may exercise its discretion to require compliance with the Rules of Judicial Administration, particularly rule 4-501, without impairing a party's substantive rights.” Fennell v. Green, 2003 UT App 291, ¶ 9 (citing, *inter alia*, Price v. Armour, 949 P.2d 1251 (1997)); see also Scott v. Majors, 1999 UT App 139, ¶ 12 (the Utah Rules of Judicial Administration “are not intended to, nor do they, create or modify substantive rights of litigants, nor do they decrease the inherent power of the court to control matters pending before it.”).

In Price v. Armour, *supra*, Price argued on appeal that the trial court erred in granting summary judgment without a hearing. The trial court had granted a hearing pursuant to rule 4-501(3) and then, without holding the hearing or explaining why it did not hold a hearing, granted Armour's motion. Price argued, as Case does here, that rule 4-501(3) required the court to grant a request for a hearing on dispositive motions.

The Utah Supreme Court held that the language of rule 4-501(3)(C) clearly required that the trial court grant Armour's request for a hearing unless either of the two exceptions applied. The Court found that the trial court erred in not holding the hearing, but stated that

For such error to compel reversal of the trial court's substantive ruling, however, it must have been prejudicial. If the error was harmless, that is, if the error was sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the case, then a reversal is not in order.

Price, 949 P.2d at 1255 (citing State v. Robertson, 932 P.2d 1219, 1227 (Utah 1997)).

The Court held that the error in not holding the hearing was not prejudicial because:

The substantive issue before the trial court was purely one of law . . . Price has not shown that he was prejudiced by the trial court's ruling on the motion without a hearing. He has not shown that he would have made new or additional arguments at the hearing that were not covered by his memorandum of points and authorities. Indeed, on appeal to this court the arguments made by Price in his appellate brief and during oral argument are the same arguments that he made in his memorandum before the trial court.

Here, the issues were mainly legal issues as Case failed to raise any genuine issues of material fact. Case failed to show below that she would have raised new arguments or factual issues. On appeal, she makes essentially the same arguments

submitted to the court below. In sum, she has failed to show that the error of the lower court was prejudicial. The actions of the trial court must therefore be deemed harmless error.

V. THE WESTS' SHOULD BE AWARDED THEIR ATTORNEYS FEES INCURRED IF THEY PREVAIL ON APPEAL.

The Wests should be awarded their attorneys fees incurred for this appeal if they prevail because they were awarded attorney's fees in the trial court below. (R. 287, 347.); Russell v. Thomas, 2000 UT App 82, ¶ 16 (citing Valcarce v. Fitzgerald, 961 P.2d 305, 319 (Utah 1998)).

**CONCLUSION**

Based on the foregoing argument, the Wests respectfully request that the actions of the trial court be affirmed in whole. In addition, the Wests request that the Court award them their attorneys fees incurred for this appeal.

RESPECTFULLY SUBMITTED this 30th day of August, 2005.

HANSEN & WRIGHT

A handwritten signature in black ink, appearing to be "J. Hansen", is written over a horizontal line.

JAMES "TUCKER" HANSEN  
ATTORNEY FOR DEFENDANTS/APPELLEES

**CERTIFICATE OF SERVICE**

I hereby certify that on the 30<sup>th</sup> day of August, 2005, I caused two copies of the foregoing to be sent via first class mail, postage prepaid, to the following:

Vincent C. Rampton  
JONES WALDO HOLBROOK &  
MCDONOUGH PC  
170 South Main, Suite 1500  
Salt Lake City, UT 84101

A handwritten signature in black ink, appearing to read 'V. C. Rampton', is written over a horizontal line.